

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re
**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

**CONSOLIDATED DOCKET NO.
14-CRB-0010-CD/SD
(2010-13)**

In re
**DISTRIBUTION OF SATELLITE
ROYALTY FUNDS**

**JOINT MOTION TO STRIKE MULTIGROUP CLAIMANTS' PURPORTED WRITTEN
DIRECT STATEMENT AND TO DISMISS MULTIGROUP CLAIMANTS
FROM THE DISTRIBUTION PHASE**

The Motion Picture Association of America, Inc. ("MPAA") and the Settling Devotional Claimants ("SDC") hereby move to strike the purported Written Direct Statement filed by Multigroup Claimants ("MGC") on December 29, 2017, and to dismiss MGC as a party from the Distribution Phase of the above-captioned consolidated proceeding. To avoid prejudice to any party, MPAA and SDC respectfully request an expedited ruling on this Joint Motion prior to the conclusion of the discovery period that the Copyright Royalty Judges ("Judges") established for the Distribution Phase of this proceeding.¹

I. INTRODUCTION

Unfortunately, we have been here before. The Judges initially set the deadline for written direct statements in the then unconsolidated cable and satellite dockets for June 30, 2017. On that day, MPAA, SDC, and the Joint Sports Claimants ("JSC") filed their respective written direct statements in both dockets in compliance with the Judges' regulations for filing written

¹ See *Order Consolidating Proceedings And Reinstating Case Schedule* at Appendix A (December 22, 2017) (establishing March 1, 2018 as the last day of the discovery period for Distribution Phase written direct statements) ("December 22 Order").

direct statements *See* 37 C.F.R. § 351.4. Also on the same day, MGC filed two documents that it claimed were written direct statements, but which were merely intended to hold its place for a later filing, after the Judges’ ruling on a pending MGC motion to reset the filing deadline. As the Judges determined, the MGC submission “include[d] none of the required elements of a written direct statement set forth in 37 C.F.R. § 351.4(b).” *See Order Granting In Part Multigroup Claimants’ Expedited Motion To Continue Distribution Proceedings Following Resolution Of Pending Motions* at 2 (August 11, 2017) (“Order to Continue Distribution Proceedings”).

In the Order to Continue Distribution Proceedings, the Judges struck MGC’s purported written direct statements from the record in this proceeding. In addition, in light of the pending motions seeking rulings on the validity of claims of the contesting parties, the Judges deemed the properly and timely-filed June 30, 2017 written direct statements submitted by MPAA, SDC, and JSC “withdrawn,” suspended discovery, and set a new deadline for the filing of Distribution Phase written direct statements following the issuance of the Judges’ ruling on the pending motions seeking allowance and disallowance of claims. *Id.* at 5. The Judges issued their *Ruling And Order Regarding Objections To Cable And Satellite Claims* (“Claims Order”) on October 23, 2017. Following issuance of the *Claims Order*, the Judges ultimately set the deadline for all parties to file Distribution Phase written direct statements on December 29, 2017. *See* December 22 Order at Appendix A.

On December 29, 2017, both MPAA and SDC (again) submitted proper and timely Distribution Phase written direct statements in this consolidated proceeding that incorporated the decisions on allowance and disallowance of claims set forth in the Claims Order. MGC, however, did not. On December 29, 2017, MGC filed a document titled “Multigroup Claimants’ Written Direct Statement” (“MGC December 29 Filing”). That document—once again—is not

a written direct statement because it too fails to comply with the Judges' regulations and the Judges' orders in this proceeding. Like MGC's June 30, 2017 submission, the MGC December 29 Filing should also be stricken. The reasons MPAA and SDC seek to strike the MGC December 29 Filing are set forth below.

II. MGC Asserts Arbitrary Claims Without Evidentiary Support, In Violation Of The Judges' Regulations, and Fails To Incorporate The Judges' Claims Order.

On October 23, 2017, the Judges issued their Claims Order in this consolidated proceeding. While the Claims Order denied MGC's motions seeking to disallow claims and titles represented by MPAA and SDC, *see* Claims Order at 40-49, 56-58, the Judges also revoked any presumption of validity as to MGC's claims, and then dismissed MGC's claims on behalf of multiple claimants and 906 specific programs. *See* Claims Order at 5-40, 59-85 (Appendices A and B). The Judges concluded the Claims Order by expressly directing the parties to "ensure that their Written Direct Statements...reflect fully the rulings on allowance and disallowance of claims detailed in this Order." *See* Claims Order at 58.

Both MPAA and SDC followed this directive, and incorporated the Judges' Claims Order rulings in their December 29, 2017 written direct statements. MGC, however, made no attempt to incorporate the Claims Order in the MGC December 29 Filing at all. Instead, MGC asserted that it is entitled to receive 100% of the Program Suppliers and Devotional category funds. *See* MGC December 29 Filing, Testimony of Raul Galaz at 7. As such, MGC's claim is *purposefully* "bogus." Because the 100% claim contains not a shred of evidentiary support or any basis to assert that it is likely to have factual support following an opportunity for discovery, it plainly does not comply with the Judges' rules at 17 C.F.R. § 350.6(e)(3) (signature of attorney certifies that factual contentions have "evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery").

Therefore, the baseless claim for 100%, with no supporting evidence, cannot be said to satisfy the Judges' rule requiring that "each party must state in the written direct statement its percentage or dollar claim to the fund." 37 C.F.R. §351.4(b)(3). Without any factual predicate, the 100% claims are both arbitrary and frivolous.

MGC expressly predicted its noncompliant submission in its *Opposition to Motion to Strike Multigroup Claimants' Written Direct Statements and To Dismiss Multigroup Claimants from the Distribution Phase* at 9 (July 27, 2017). At that time, MGC asserted it could not make any legitimate claim in the June 30 filing, because motions to strike claims were pending and any attempt to suggest a claim would, in its words, be "bogus." In reply, MPAA, JSC, and SDC pointed out exactly why MGC's proposed "bogus" claim would be impermissible:

Finally, MGC is wrong to suggest that its procedural default is immaterial because a party could elect to "arbitrarily assert a claim to 100% (or 50%, or 1%) of a pool pending review of the adversary's methodology" Opposition at 2-3. It is not sufficient to claim some made-up number, "no matter how bogus," as MGC puts it. Opposition at 9. To assert an "arbitrary" figure without any evidentiary support would plainly contravene 37 C.F.R. § 350.6(e), which provides that the signature of an attorney constitutes certification that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."²

Especially in light of the Claims Order, which lays to rest any disputes about which claims are deemed to be compensable in these proceedings, MGC's claims that it is entitled to receive 100% of the Program Suppliers and Devotional category funds cannot be "true and correct." See Claims Order at 40-49, 56-58. Accordingly, MGC lacked any good faith basis on

² See MPAA, SDC, and JSC Reply Supporting Motion To Strike MGC's Purported Written Direct Statement and to Dismiss MGC at 7 (filed August 3, 2017).

which to assert claims to 100% of the Program Suppliers and Devotional category funds in the MGC December 29 Filing.

MGC's purported reliance on MPAA and SDC's alleged prior claims for 100% of the Program Suppliers and Devotional category funds in this proceeding are entirely misplaced. As MPAA made clear in its now-deemed-withdrawn June 30, 2017 Distribution Phase written direct statements, its previous claims for 100% of the Program Suppliers category funds was premised on its pending motions seeking disallowance of *all* claimants and titles that MGC claims to represent in this proceeding.³ Now that all claims issues in this proceeding are resolved, MPAA's December 29, 2017 written direct statement filings incorporate the Claims Order, and do not seek a 100% share of Program Suppliers royalties for MPAA. The SDC's June 30, 2017 written direct statement conservatively assumed that all MGC claims were valid pending a ruling on their claims-related objections, and (contrary to MGC's assertion in the MGC December 29 Filing) sought royalty shares for the SDC that were less than 100% of the Devotional category royalty funds.⁴ The SDC also do not seek a 100% share of Devotional category royalty funds in their December 29, 2017 written direct statement.

Clearly, by acting as if Judges never ruled on MGC's claims-related motions, MGC's December 29 Filing violated the Judges' directive to incorporate the Claims Order, and failed to support its claims of 100% of the royalties Program Suppliers' and Devotionals categories. Moreover, MGC's unsupported and noncompliant submission unfairly prejudices parties like

³ See, e.g., MPAA June 30, 2017 Cable and Satellite Written Direct Statements, Introductory Memorandums at 4-5, Gray Written Direct Testimonies at 3 ("I further understand that MPAA has filed a motion in this proceeding contesting the validity of all of the claimants and program titles MC purports to represent. Pending a ruling on that I motion, I assume that none of MC's claims are valid. Therefore, for each royalty year 2010 through 2013, I assign a zero royalty share to MC.").

⁴ See Written Direct Statement Of The Settling Devotional Claimants at 1 and 3 (June 30, 2017).

MPAA and SDC, who expended considerable time and resources in this proceeding to submit Distribution Phase written direct statements on December 29, 2017 that complied with the Claims Order, as the Judges directed. The Judges should strike the MGC December 29 Filing with prejudice.

III. MGC Failed To Set Forth A Distribution Methodology.

In the *August 11 Order*, the Judges could not have been clearer that filing a written direct statement, inclusive of an evidence-based distribution methodology, is an essential element of participation in each phase of a royalty distribution proceeding. Indeed, the Judges ruled as follows:

Filing a written direct statement in each phase remains an essential requirement for further participation in that phase of the proceeding. *See* 37 C.F.R. § 351.4(a); *see also Order Granting SoundExchange Motion to Dismiss Muzak LLC*, Docket No. 2006-1 CRB DSTR (Jan. 10, 2007); *Order Granting SoundExchange's Motion to Dismiss Persons and Entities That Did Not File a Written Direct Statement*, Docket No. 2005-1 CRB DTRA (Jan. 20, 2006); *Order*, Docket No. 2000-9 CARP DTRA 1&2 (Apr. 23, 2001). Articulating one's allocation methodology and presenting the evidence supporting it is the most basic, indispensable element of any party's participation in adjudicating allocation issues. Failing to do so is inimical to a party's continued participation in the category allocation decision.

August 11 Order at 3.

Despite this unambiguous ruling (which the Judges even reissued on December 15, 2017, only a few days before the MGC December 29 Filing was submitted), MGC failed to articulate any distribution methodology in its purported written direct statement *at all*, admitting that it “submits no sponsored distribution methodology” in the MGC December 29 Filing. *See* MGC

December 29 Filing, Testimony of Raul Galaz at 3. Instead, MGC argues⁵ that it should be permitted to not articulate its own distribution methodology, but instead sandbag the other parties in the rebuttal phase of this proceeding with shares derived from its cherry-picked adjustments to the shares proposed by MPAA and SDC, based in some undisclosed way on *their* respective methodologies:

As regards the distribution of 2010-2013 cable and satellite royalties, Multigroup Claimants submits no sponsored distribution methodology. Rather, Multigroup Claimants has elected to accept the results of methodologies submitted by adverse parties in these proceedings, subject only to modification as to their accuracy and reasonableness, and according to evidence obtained during the course of these proceedings. To the extent that any proposed methodologies are lacking in accuracy or reasonableness, such issues will be addressed during the rebuttal phase of these distribution proceedings. That is, Multigroup Claimants' concession to any distribution methodology proposed by an adverse party is not unqualified. Rather, it remains subject to any adjustments warranted by information discovered during the course of these proceedings. Moreover, following the presentation of evidence in the distribution proceeding, the Judges may elect to apply a distribution methodology that was originally submitted in one category in order to dictate the results in another category.

MGC December 29 Filing, Testimony of Raul Galaz at 3-4 (footnotes omitted).

If this sounds strangely familiar to the Judges, it is because MGC's predecessor (and real party in interest), IPG, tried a very similar tactic unsuccessfully in the 2004-2009 Cable and 1999-2009 Satellite Phase II proceeding, where IPG's witness Dr. Laura Robinson, having initially sponsored an unreliable distribution methodology, attempted to submit a modified version of MPAA witness Dr. Jeffrey Gray's distribution methodology for the first time as a part of IPG's written rebuttal statement (the so-called "Robinson-Gray methodology"), to be applied

⁵ The only "testimony" attached to the MGC December 29 Filing is the Testimony of Raul Galaz, which is primarily comprised of improper legal argument, and contains no information or evidence that would assist the Judges in the distribution of royalty payments in this proceeding.

to both the Program Suppliers and Devotional categories. The Judges rejected IPG's attempt, and excluded the Robinson-Gray methodology from evidence. *See* April 16, 2015 Transcript, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 165-66; *see also Order Denying SDC Motions To Strike IPG Testimony And Exhibits*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 2-3 (July 20, 2015). MGC cannot reasonably expect a different outcome in this proceeding.

Having failed to submit a distribution methodology in this proceeding by the December 29, 2017 deadline prescribed by the Judges, MGC cannot file a mere placeholder pleading and 100% claims now, strictly as a ruse to obtain discovery from MPAA and SDC, and hope for a second bite at the apple in the rebuttal phase of this proceeding. Put simply, the MGC December 29 Filing fails to satisfy the required elements of a written direct statement as set forth in the Judges' orders, and should be stricken by the Judges with prejudice.

IV. MGC Should Be Dismissed From The Distribution Phase Of This Proceeding.

In the *August 11 Order*, the Judges found that MGC had forfeited its right to participate in the Allocation Phase of this proceeding for failing to file an Allocation Phase written direct statement by the applicable deadline. *See August 11 Order* at 4; *see also Order Granting SoundExchange Motion To Dismiss Muzak LLC*, Docket No. 2006-1 CRB DSTRA (January 10, 2007); *Order Granting SoundExchange's Motion To Dismiss Persons And Entities That Did Not File A Written Direct Statement*, Docket No. 2005-1 CRB DTRA (January 20, 2006); *Order*, Docket No. 2000-9 CARP DTRA 1&2 (April 23, 2001). In light of MGC's intentional submission of the defective, placeholder MGC December 29 Filing, MPAA and SDC ask that the Judges find MGC to be in procedural default, and issue an order also dismissing MGC from the Distribution Phase of this consolidated proceeding.

Precedent requires automatic dismissal of any party that fails to submit a timely and compliant written direct statement. Such dismissal is appropriate in this case where a party intentionally files a pleading such as the MGC December 29 Filing, which fails to comply with the Judges' orders and regulations. Moreover, the Judges clearly have authority to dismiss a participant from royalty distribution proceedings as a sanction for procedural violations. *See* 17 U.S.C. § 801(c); *see also Order*, Docket Nos. 2001-8 CARP CD 98-99, et al., at 6 (June 26, 2006) ("June 26, 2006 Order"). Indeed, the Copyright Office ("Office") made it clear that a party's persistent failure to follow the regulations can be (and has been) grounds for dismissal:

While the Office will excuse a party's occasional lapse in following the regulations, even those governing proper service, the Office cannot and will not tolerate a party's persistent failure to comply as is the case here. IPG's repeated failure to effect proper service even after the Office had cited the appropriate rules demonstrates a flagrant disregard of the rules governing these proceedings and of Orders issued therein, as well as a lack of respect for the Office and the other parties in these proceedings. Administrative proceedings cannot be run effectively or efficiently where parties to the proceeding disregard the carefully developed procedures governing the process, and a party will be, and indeed has been, dismissed from a proceeding for failure to adhere to its rules and comply with its orders. *See, Order*, in Docket No. 2002-1 CARP DTRA3 (August 15, 2003) (dismissing party in rate adjustment proceeding for failure to comply with Office Order and with service requirements); *Order*, in Docket No. 95-1 CARP DD 92-94 (May 9, 1996) (dismissing two participants in a distribution proceeding for failure to comply with procedural and substantive rules for the submission of written direct cases, including failure to effect proper service on the parties in the proceeding). Accordingly, any future failure by IPG to comply with the Office's regulations, especially those governing the proper service of pleadings, will result in IPG's dismissal from these proceedings.

June 26, 2006 Order at 6. As is clear from the foregoing, the Judges' predecessors have dismissed parties from royalty distribution proceedings for far less egregious misconduct.

Finally, MGC is no sympathetic figure. MGC has simply followed the template of arrogance and system abuse perpetrated by its predecessor, real party in interest, and alter ego, IPG. As the Judges are aware, for nearly two decades, IPG has notoriously flouted the Judges' and the Office's regulations.⁶ The constant assault on the Judges' procedures and the damage to the respectability of these proceedings has been profound.

Assigning IPG's representation of current claims to Mr. Galaz's father and changing its acronym to MGC does not break the chain of misconduct evident for years, nor does it permit MGC to plead for leniency as a newcomer. Thus, MPAA and the SDC urge the Judges decisively and swiftly to exercise their authority under the Copyright Act and precedent, and enter an order dismissing MGC from the Distribution Phase of these proceedings for intentionally disregarding the Judges' regulations and orders.

V. CONCLUSION

For the foregoing reasons, the Judges should grant the Joint Motion, strike MGC's purported written direct statement with prejudice, and dismiss MGC as a participant in the Distribution Phase of this consolidated proceeding.

⁶ See, e.g., June 26, 2006 Order at 6; see also *Order Admonishing IPG*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 1-2 (January 3, 2017) (admonishing IPG for failing to serve the other parties to that proceeding with a copy of an IPG motion); *Memorandum Opinion And Ruling On Validity Of Claims*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 7-10 and 39 (March 13, 2015) (sanctioning IPG with revocation of any "presumption of validity" for IPG's claims and dismissing certain Devotional category claims for violation of the Judges' discovery rules); *Memorandum Opinion And Order Following Preliminary Hearing On Validity Of Claims*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 2-5 and Exhibit B (March 21, 2013) (dismissing numerous improper IPG's claims).

Respectfully submitted,

PROGRAM SUPPLIERS

/s/ Gregory O. Olaniran

Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
Alesha M. Dominique
D.C. Bar No. 990311
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street N.W., 8th Floor
Washington, D.C. 20036
Telephone: (202) 355-7817
Fax: (202) 355-7887
goo@msk.com
lhp@msk.com
amd@msk.com

Dated: January 9, 2018

**SETTLING DEVOTIONAL
CLAIMANTS**

/s/ Arnold P. Lutzker

Arnold P. Lutzker
DC Bar No. 101816
Benjamin Sternberg
DC Bar No. 1016576
Jeannette M. Carmadella
DC Bar No. 500586
LUTZKER & LUTZKER LLP
1233 20th Street, NW, Suite 703
Washington, DC 20036
Telephone: (202) 408-7600
Fax: (202) 408-7677
arnie@lutzker.com

/s/ Matthew J. MacLean

Matthew J. MacLean
D.C. Bar No. 479257
Michael A. Warley
D.C. Bar No. 1028686
Jessica T. Nyman
D.C. Bar No. 1030613
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: (202) 663-8525
Fax: (202) 663-8007
matthew.maclean@pillsburylaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2018, a copy of the foregoing filing was provided electronically via eCRB or sent by Federal Express overnight to the parties listed below:

**INDEPENDENT PRODUCERS GROUP
MULTIGROUP CLAIMANTS
SPANISH LANGUAGE PRODUCERS**

Brian D. Boydston
PICK & BOYDSTON LLP
10786 Le Conte Avenue
Los Angeles, CA 90024

**NATIONAL ASSOCIATION OF
BROADCASTERS
COMMERCIAL TELEVISION
CLAIMANTS**

John I. Stewart, Jr.
David Ervin
Ann Mace
Emily S. Parsons
Crowell & Moring, LLP
1001 Pennsylvania Ave, NW
Washington, DC 20004-2595

**AMERICAN SOCIETY OF
COMPOSERS, AUTHORS, AND
PUBLISHERS**

Samuel Mosenkis
ASCAP
One Lincoln Plaza
New York, NY 10023
Telephone: (212) 621-6450

SESAC, INC.

John C. Beiter
Leavens, Strand & Glover, LLC 47 Music
1102 17th Avenue South
Suite 306
Nashville, TN 37212
Telephone: (615) 341-3457

Christos P. Badavas
SESAC
152 West 57th Street
57th Floor
New York, NY 10019
Phone: (212) 586-3450

CANADIAN CLAIMANTS GROUP

L. Kendall Satterfield
Satterfield PLLC
1629 K Street, NW
Washington, DC 20006

Victor J. Cosentino
Larson & Gaston LLP
200 S. Los Robles Ave., Suite 530
Pasadena, CA 91101

**PUBLIC TELEVISION CLAIMANTS
PUBLIC BROADCASTING SERVICE**

Ronald G. Dove, Jr.
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20268
Telephone: (202) 662-5685

R. Scott Griffin
PUBLIC BROADCASTING SERVICE
2100 Crystal Drive
Arlington, VA 22202-3785
Telephone: (703) 739-8658

BROADCAST MUSIC, INC.

Joseph J. DiMona
BROADCAST MUSIC, INC.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0030
Telephone: (212) 220-3149

Brian Coleman
DRINKER BIDDLE & REATH LLP
1500 K Street, NW – Suite 1100
Washington, DC 20005
Telephone: (202) 842-8800

PROFESSIONAL BULL RIDERS

Arnold P. Lutzker
LUTZKER & LUTZKER LLP
1233 20th Street, NW, Suite 703
Washington, DC 20036
Telephone: (202) 408-7600

**ARENA FOOTBALL ONE, LLC
MAJOR LEAGUE SOCCER**

Edward S. Hammerman
HAMMERMAN PLLC
5335 Wisconsin Avenue, N.W., Suite 440
Washington, D.C. 20015-2054
Tel: (202) 686-2887

NATIONAL PUBLIC RADIO

Gregory A. Lewis
NATIONAL PUBLIC RADIO
1111 North Capitol Street, NE
Washington, DC 20002
Tel: (202) 513-2050

/s/ Lucy Holmes Plovnick

Certificate of Service

I hereby certify that on Tuesday, January 09, 2018 I provided a true and correct copy of the Joint Motion To Strike Multigroup Claimants' Purported Written Direct Statement And To Dismiss Multigroup Claimants From The Distribution Phase to the following:

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss served via Electronic Service at jennifer.criss@dbi.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Joint Sports Claimants (JSC), represented by Iain McPhie served via Electronic Service at iain.mcphie@squirepb.com

Major League Soccer, LLC, represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Canadian Claimants Group, represented by Victor J Cosentino served via Electronic Service at victor.cosentino@larsongaston.com

Public Broadcasting Service (PBS) and Public Television Claimants (PTC), represented by Lindsey L. Tonsager served via Electronic Service at ltonsager@cov.com

Multigroup Claimants (MGC), represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

National Public Radio (NPR), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

Spanish Language Producers, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

SESAC, Inc., represented by Christos P Badavas served via Electronic Service at cbadavas@sesac.com

Broadcaster Claimants Group (BCG) aka NAB aka CTV, represented by John Stewart served via Electronic Service at jstewart@crowell.com

Signed: /s/ Lucy H Plovnick